

1. **1512608 (Migration) [2016] AATA 4870 (22 July 2016)**

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DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANT: Mr NIKOLIN FATI

CASE NUMBER: 1512608

DIBP REFERENCE(S): BCC2015/311835

MEMBER: Antonio Dronjic

DATE: 22 July 2016

PLACE OF DECISION: Melbourne

DECISION: The tribunal affirms the decision not to grant the applicant a Student (Temporary) (Class TU) visa.

Statement made on 22 July 2016 at 2:08pm

CATCHWORDS

Migration – Student (Temporary) (Class TU) – Subclass 572 (Vocational Education and Training Sector) – Enrolment into Diploma of Business course provided – Restaurant never offered employment to applicant – Business willing to offer employment in another restaurant – Supplied bogus documentation

LEGISLATION

Migration Act 1958, ss 5, 65

Migration Regulations 1994, Schedule 2 cl 572 Schedule 4 Criterion 4020

CASES

Arora v MIBP [2016] FCAFC 35

Batra v MIAC [2013] FCA 274

Plaintiff M64/2015 v MIBP [2015] HCA 50

Sandhu v Minister for Immigration & Anor [2013] FCCA 491

Trivedi v MIBP [2014] FCAFC 42

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

4. This is an application for review of a decision made by a delegate of the Minister for Immigration on 1 September 2015 to refuse to grant the applicant a Student (Temporary) (Class TU) visa under s.65 of the *Migration Act 1958* (the Act).
5. The applicant applied for the visa on 29 January 2015. The delegate refused to grant the visa on the basis that the applicant did not satisfy Public Interest Criteria (PIC 4020) for the purposes of cl.572.224(a) of Schedule 2 to the Migration Regulations 1994 (the Regulations).
6. The applicant sought review of the delegate's decision on 15 September 2015. The applicant was represented in relation to the review by his registered migration agent. With the review application he submitted a copy of the primary decision record according to which:
 - On 29 January 2015 the applicant lodged an application for subclass 572 visa;
 - On 30 January 2015, the department requested from the applicant to provide evidence relevant to meeting the genuine temporary entrant criteria (GTE) in cl.572.223(1)(a);
 - On 20 February 2015, the applicant provided evidence to the department that was considered to be of a 'non genuine' nature in the form of an email from pizzeria.duemori@liberto.it dated 6 February 2015 and received by the department from the applicant's representative on 17 February 2015.
7. The department conducted verification of the document provided and for the following reasons concluded that the e-mail received from pizzeria.duemori@liberto.it was a bogus document.
 - The departmental staff from the Australian Embassy in Berlin contacted the Pizzeria I Due Mori using the contact details specified on their website and spoke with the owner of the restaurant. The owner advised the officers that he does not know Mr Nikolin Fati (the applicant) or Mr Roberto Gatto (a person who's named appeared on the e-mail of 6 February 2015) and that his business never offered employment to Mr Fati;
 - The officers telephoned the number provided as a contact details in the e-mail of 6 February 2016 and the applicant's sister Ms Antuana Fati answered the call. She stated that she used to work with Mr Gatti at Pizzeria I Due Mori. When the officer inquired if she had Mr Gatto's telephone number, she asked the officer to call her back in five minutes. When the officer rang her back, she stated that she drove to the restaurant to give Mr Gatto her phone;
 - The officers spoke to Mr Gatto who stated that Mr Fati worked for him at 'Mondo Pizza' for seven months 'of the books'; that he acquired the Pizzeria I Due Mori but refused to provide details of the purchase; that the pizzeria is closed but will reopen at the end of the year and that pizzeria's official telephone number is not yet active.
8. On 7 May 2015, the department invited the applicant to provide his comments and response on the suspected 'non-genuine' document. On 9 May 2015 the applicant's representative submitted another letter from Mr Gatto dated 7 June 2015 clarifying that he never claimed

that Mr Fati worked at pizzeria I Due Mori; that, if the purchase of pizzeria I Due Mori does not come through, he is willing to offer Mr Fati a position in another restaurant currently owned by him. Mr Gatto signed this letter and provided contact telephone number that was different from the one provided in the e-mail of 6 February 2015.

9. The delegate concluded that the applicant submitted a bogus document to the department and, after considering waiver provisions, proceeded to make decision on 1 September 2015.
10. The applicant sought review of the delegate's decision on 15 September 2015 and with his application provided a copy of the primary decision record. The applicant was represented in relation to the review by his registered migration agent.
11. On 29 April 2016, the tribunal wrote to the applicant advising that it had considered all the material before it relating to his application but it was unable to make a favourable decision on that information alone. The tribunal invited the applicant to give oral evidence and present arguments at a hearing on 21 July 2016.
12. On 18 July 2016, the applicant's representative submitted:
 - Copies of the applicant's educational certificates from Australia;
 - New certificate of enrolment into Diploma of Business course due to commence on 25 July 2016 and finish on 25 July 2017;
 - New offer of employment from pizzeria Antico Borgo dated 10 June 2016 signed by Matilda Costa; and
 - Letter from the applicant's parents offering financial support for their son's study in Australia.
 - Legal submissions arguing that the departmental officer misunderstood the letter from Mr Gatti and that the applicant has a genuine job offer from Italy.
13. The applicant appeared before the tribunal on 21 July 2016 to give evidence and present arguments. The applicant was represented in relation to the review by his registered migration agent who attended the hearing. The tribunal hearing was conducted with the assistance of an interpreter in the Italian and English languages. The applicant confirmed that he was having no difficulty in understanding the interpreter. I explained the tribunal procedures and requirements of PIC 4020(1) and PIC 4020(4) relevant to the application.
14. The applicant is 32 years of age citizen of Italy where he lived from 1999 until his latest arrival in Australia in August 2013. He is separated and has a daughter who is 13 years of age. His ex-wife and daughter live in Italy and the applicant is financially supporting both of them pursuant to Court Order made by the Italian Court (copy provided to the tribunal). He does not own any property under his name in Italy or Albania.
15. The applicant's parents and one of his two sisters, Antuana Fati, also live in Italy. The applicant claims that, prior to arriving in Australia; he operated building and construction business in Italy and Albania.
16. He arrived in Australia on 17 August 2013 as a holder of a visitors' (ETA) visa. On 20 November 2013 he was granted a Student visa subclass 572. He successfully completed an Advanced Diploma in Hospitality course and is currently enrolled into Diploma in Business Management course that is due to commence on 25 July 2016 and finish on 25 July 2017.

17. He does not work in Australia. He stated in his evidence that his parents, who own a building and construction business in Italy and Albania, are sending him money required for study and stay in Australia.
18. The applicant confirmed in his evidence that, acting on the department invitation to provide evidence and submissions relevant to genuine temporary entrant criteria (GTE), he submitted to the department email from Mr Gatto dated 6 February 2015 as evidence of having a job offer in Italy upon completing his studies in Australia.
19. I asked the applicant to explain the nature of his relationship with Mr Gatto. He stated that between 2006 and 2008, on weekends, he worked as a waiter at pizzeria 'Belmondo' which was operated by Mr Gatto. He did not describe Mr Gatto as his friend. He maintained limited contact with Mr Gatto before travelling to Australia in 2013.
20. Upon receiving the department's request to address GTE criteria, the applicant contacted his sister Antuana in order to obtain Mr Gatto's contact number. The applicant's sister used to work for Mr Gatto. In February 2015, the applicant spoke to Mr Gatto and asked him to send a letter confirming that he has a job offer upon returning to Italy. The applicant gave evidence that he knew that Mr Gatto was not the owner of pizzeria I Due Mori in February 2015 but was in the process of acquiring this business. He was told that Mr Gatto is negotiating the purchase of this business.
21. I noted that according to the primary decision records submitted by the applicant with the review application, the department spoke to the owner of pizzeria I Due Mori who informed the officers of the department that he did not know Mr Gatto. I asked the applicant, if Mr Gatto was negotiating purchase of this pizzeria, how is it possible that the owners of the pizzeria did not know who Mr Gatto is. The applicant stated that it is possible that the owners, for privacy reasons, did not want to disclose any details considering the sale of their business. I noted that the officers did not ask the owners whether they are selling business. They simply asked if the owner knows Mr Gatto and he stated that he does not know him.
22. I ask the applicant if the telephone number provided in the e-mail received from Mr Gato in February 2015 belongs to Mr Gatto or his sister. He stated that number belongs to Mr Gatto. I asked why would his sister be in possession of Mr Gatto's telephone and answered the call. He stated that his sister is working (pizza delivery) for Mr Gatto of the books.
23. I noted that according to the primary decision records submitted by the applicant with the review application, when the officer rang his sister back, she stated that she drove to the restaurant to give Mr Gatto her phone.
24. I indicated to the applicant that, based on the evidence before me, it appears that Mr Gatto was not the owner of pizzeria I Due Mori in February 2015 when he wrote the e-mail that was submitted to the department with the visa application. He had no authority to write the e-mail on behalf of the pizzeria. As such I explained to the applicant that, pursuant to definition of bogus document in s.5(1) of the act, it appears that the document is counterfeit. I indicated that I accept the applicant's submissions that, contrary to the delegate's findings, the e-mail of 6 February 2015 neither contains a job offer at pizzeria I Due Mori nor it asserts that the applicant was previously employed at pizzeria I Due Mori.
25. I invited the applicant to indicate if there are any compelling circumstances that affected the interests of Australia, or any compassionate or compelling circumstances that affected the interests of an Australian citizen, permanent resident or eligible New Zealand citizen, which would justify the grant of the visa. I also explained that circumstances affecting the applicant are not relevant for considerations of PIC4020 (4) as he is not an Australian citizen or

permanent resident. The applicant did not raise any such circumstances. He stated that he would like to complete the current course and then return back to Italy.

26. For the following reasons, the tribunal has concluded that the decision under review should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

27. The issue in this review is whether the visa applicant meets Public Interest Criterion 4020 (PIC 4020) as required by cl.572.224 for the grant of the visa. Broadly speaking, this requires that:
- there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: cl.4020(1); and
 - the applicant and each member of the family unit has not been refused a visa because of a failure to satisfy cl.4020(1) during the period starting 3 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: cl.4020(2) and (2AA); and
 - the applicant satisfies the Minister as to his or her identity: cl.4020(2A); and
 - neither the applicant nor any family unit member has been refused a visa because of a failure to satisfy cl.4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: cl.4020(2B) and (2BA).
28. The requirements in cl.4020(1) and (2) can be waived if there are certain compelling or compassionate reasons justifying the granting of the visa: cl.4020(4). However, this waiver does not apply to the identity requirements in cl.4020(2A) and (2B). PIC 4020 is extracted in the attachment to this decision.

HAS THE APPLICANT GIVEN, OR CAUSED TO BE GIVEN A BOGUS DOCUMENT, OR INFORMATION THAT IS FALSE OR MISLEADING IN MATERIAL PARTICULAR?

29. The term 'information that is false or misleading in a material particular' is defined in cl.4020(5) and the term 'bogus document' is defined in s.5(1) of the Act (see the attachment to this decision). In contrast to the definition of 'information that is false or misleading in a material particular' in cl.4020(5), the reference in the definition of bogus document to a document that was obtained because of a 'false or misleading' statement has no requirement that it be relevant to a criterion for the grant of the visa: *Arora v MIBP* [2016] FCAFC 35; *Batra v MIAC* [2013] FCA 274.
30. The requirement in cl.4020(1) not to provide a bogus document, or false or misleading information, applies whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant: cl.4020(3). It also applies whether or not the document or information was provided by the applicant knowingly or unwittingly.

31. While PIC 4020 refers to information that is false, in the sense of purposely untrue, it is not necessary for the Minister (or the tribunal on review) to conclude that the applicant was aware the information was purposely untrue in order for PIC 4020 to be engaged. However, an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.
32. The tribunal must make an assessment as to whether there is evidence that is sufficiently probative to lead to a conclusion that the applicant has given, or caused to be given, to the Minister, or an officer of the Department, the tribunal a bogus document or information that is false or misleading in a material particular in relation to his application for a Student visa subclass 572.
33. I note that, according to the definition of a bogus document in s.5(1) of the Act, it is sufficient that the tribunal “reasonably suspects” that the document was bogus, for example, because it was not issued in respect to the applicant or because it is counterfeit or has been altered or was obtained because of false or misleading statement (see *Sandhu v Minister for Immigration & Anor* [2013] FCCA 491).
34. In his evidence, the applicant stated that, on 17 February 2015, together with other documentary evidence, he submitted to the department through his migration agent, an e-mail dated 6 February 2015 sent from email address pizzeria.duemondi@liberto.it. The e-mail relevantly stated:
 35. *‘Hello, we are the pizzeria I Due Mori from Carmagnola...*
 36. *Mr Fati could start with us his business manager for the new pizzeria we are opening in Turin. Having previously worked with Mr Fati we know that he will be able to organise and better manage all the work that concerns our new restaurant. We leave our contact details if you need to contact us ...*
 37. *The Pizzeria I Due Mori*
 38. *1022 Carmagnola*
 39. *Mr Roberto Gatti*
 40. *Tel: number xxx xxx 1722.*
41. I have placed some weight on the information relating to the Department’s verification of the document submitted by the applicant, as set out in the delegate’s decision. However, as indicated to the applicant during the hearing, I accept that the e-mail of 6 February 2015 neither contains a job offer at pizzeria I Due Mori nor it asserts that the applicant was previously employed at pizzeria I Due Mori as it was stated in the primary decision.
42. Based on the evidence before it, which I consider of sufficiently probative value, I find that the e-mail received from email address pizzeria.duemondi@liberto.it dated 6 February 2015 the visa applicant submitted to the Department with his visa application is a counterfeit and as such, a bogus document as defined in s.5(1)(b).
43. According to Macquarie Dictionary, the word ‘Counterfeit’ means ‘made to imitate, and pass for, something else; not genuine.
44. Based on the evidence before me I am satisfied that the e-mail of 6 February 2015 was created by Mr Gatto to imitate a letter from the owners of the pizzeria I Due Mori. He used the business e-mail address and provided the business’ street address without having any authority to do so. In the e-mail Mr Gatto wrote ‘*We are the pizzeria I Due Mori from Carmagnola*’. The applicant confirmed in his evidence that Mr Gatto was not the owner of the pizzeria I Due Mori at the time he wrote the e-mail in February 2015. I am satisfied on the evidence that the document was not a genuine letter from Pizzeria I Due Mori.

45. As a result, I am *not* satisfied that there is *no evidence* that the applicant has given, or caused to be given, to the Minister, or an officer of the Department, the tribunal or a relevant assessing authority a bogus document or information that is false or misleading in a material particular in relation to his application for a Student visa subclass 572. Accordingly, the tribunal finds that the applicant does not meet the requirements of paragraph 4020(1)(a).

SHOULD THE REQUIREMENTS OF CL.4020(1) OR (2) BE WAIVED?

46. The requirements of cl.4020(1) and (2) may be waived where there are compelling circumstances that affect the interests of Australia, or where there are compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident, or an eligible New Zealand citizen (as defined in r.1.03), that justify the granting of the visa.
47. The expressions 'compelling circumstances' and 'compassionate or compelling circumstances' are not defined for these purposes. To be compelling, the circumstances must force or drive the decision-maker irresistibly to be satisfied: see *Plaintiff M64/2015 v MIBP* [2015] HCA 50. The ordinary meaning of 'compassionate' relates to feelings of sympathy, sorrow, pity or concern for others.
48. The applicant did not raise any such circumstances with the tribunal. Accordingly, I am not satisfied on the evidence before me that compelling circumstances that affect the interests of Australia or compassionate or compelling circumstances that affect the interests of an Australian citizen, permanent resident or eligible New Zealand citizen exist and would justify the granting of a subclass 572 visa to the applicant. Therefore, I find that the requirements of cl.4020(1) should not be waived.
49. On the basis of the above, the applicant does not satisfy PIC 4020 for the purposes of cl.572.224(a).
50. The other subclasses within the TU visa class have an equivalent provision requiring the applicant to satisfy PIC 4020. For the reasons given above, the tribunal also finds that the applicant does not meet the requirements of these subclasses.

DECISION

51. The tribunal affirms the decision not to grant the applicant a Student (Temporary) (Class TU) visa.

Antonio Dronjic
Member

ATTACHMENT

MIGRATION REGULATIONS 1994

SCHEDULE 4

- 4020 (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the tribunal during the review of a Part 5 reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:
- (a) the application for the visa; or
 - (b) a visa that the applicant held in the period of 12 months before the application was made.
- (2) The Minister is satisfied that during the period:
- (a) starting 3 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa; the applicant and each member of the family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).
- (2AA) However, subclause (2) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (2A) The applicant satisfies the Minister as to the applicant's identity.
- (2B) The Minister is satisfied that during the period:
- (a) starting 10 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa; neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the criteria in subclause (2A).
- (2BA) However, subclause (2B) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.
- (4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:
- (a) compelling circumstances that affect the interests of Australia; or
 - (b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;
- justify the granting of the visa.
- (5) In this clause:
- information that is ***false or misleading in a material particular*** means information that is:
- (a) false or misleading at the time it is given; and
 - (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

...

MIGRATION ACT 1958

S.5 INTERPRETATION

(1) In this Act, unless contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

...